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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSEPH F. FRANKL, Regional Director of Region 20 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ADAMS & ASSOCIATES, INC.,

Respondent.

Civil No. 2:14-cv-02766-KJM-EFB

PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO STRIKE EVIDENCE SUBMITTED BY PETITIONER IN ITS REBUTTAL MEMORANDUM REGARDING PETITION FOR INJUNCTION UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT

Date: January 16, 2015
Time: 10:00 a.m.
Judge: Kimberly J. Mueller
Crtrm: 3 (15th Floor)

I. INTRODUCTION

Petitioner vehemently opposes Respondent's request for a continuance of the hearing on the Petition, now scheduled for January 23, 2015. The Board is seeking Section 10(j) relief because there is an imminent risk of irreparable harm to the collective-bargaining relationship; any further delay only increases the likelihood that such harm will occur. Respondent has ample time to formulate its response to the Petitioner's Rebuttal, which it received a full two weeks prior to the date of the hearing on the Petition.[1] Indeed, Petitioner has no objection to Respondent's filing of a sur-rebuttal no later than January 20, 2015. In addition, Respondent's motion to strike portions of Petitioner's Rebuttal and supporting exhibits should be denied. The transcript of Weldon's interview rebuts Respondent's assertions in its Opposition that it had no unlawful motivation for not hiring Genesther Taylor and does not expand Petitioner's request for injunctive relief or its theory as to why such relief is needed. Further, Respondent has not made the requisite showing under applicable federal standards to establish its claim of attorney-client privilege.

II. WELDON'S STATEMENT WAS PROPERLY OFFERED TO REBUT RESPONDENT'S FACTUAL ASSERTIONS

Petitioner's offering of Weldon's sworn statement in support of its Rebuttal is proper because it reflects new information unknown to the Region at the time the Petition was filed, and only uncovered during the course of a subsequent administrative investigation. Moreover, this newly acquired information regarding Respondent's unlawful motivation in refusing to hire Genesther Taylor and other employees directly refutes factual assertions Respondent makes in its

[1] With respect to Respondent's counsel's representation that he will be on leave due to expected birth of his first child during the weeks of January 12 and 19, Petitioner is not unmindful of that personal obligation but notes that Respondent has two attorneys representing it in this matter, one of whom has made no such representation.

Memorandum of Points and Authorities in Opposition to the Petition. Petitioner's references to this newly acquired information do not present a new theory or argument for the first time, but rather bolster Petitioner's argument from the outset that Union President Genesther Taylor was unlawfully refused employment because of her union activity or affiliation.

As a preliminary matter, this Court expressly authorized the Region's submission of declarations and exhibits in support of its Rebuttal. *See Minute Order to Show Cause*, 14-cv-02766, ECF No. 8 (Dec. 4, 2014) ("Petitioner may file his rebuttal, including affidavits, declarations, and exhibits, and serve copies upon respondent and its counsel of record by January 9, 2015.") (emphasis added). *See generally*, *Blacks Law Dictionary* 1295 (8th ed. 2007) (defining rebuttal as "the time given to a party to present contradictory evidence or arguments."). Respondent expressly denied "seeking to deprive its employees of the union representation of their choice" and asserted that it "has no union animus." (Resp. Opp. (ECF No. 17) at 16). Petitioner is entitled to rebut these assertions. Petitioner has not, as Respondent styles it, presented a "new and alternative theory" to the Court. (Resp. Mot. (ECF No. 21) at 2.) Rather, Weldon's sworn statement provides additional, direct evidence to bolster the Region's strong circumstantial case that Respondent harbored animus against Taylor because of her union activity. Petitioner assures the Court that it will not be seeking Section 10(j) relief with respect to two additional refusals to hire alleged in the Second Amended Complaint.

Consideration of the exhibits supporting Petitioner's rebuttal is particularly appropriate here because Petitioner was not able to interview Ms. Weldon until December 19, 2014, well after the filing of the Petition. (*See* Declaration of Joseph D. Richardson in Support of Rebuttal (ECF No. 17) at 2.) But for the misleading statements by Respondent's manager, Jimmy Gagnon, regarding his reliance on the Qualification Assessment Forms and File Notes in making

hiring decisions—a material misstatement to a federal investigator that Respondent did not correct until it filed its Opposition with this court—Petitioner could have identified a need to obtain evidence from Ms. Weldon during its initial investigation and taken appropriate steps to do so.

Petitioner also properly denied Respondent's counsel's request to attend the Weldon interview under longstanding Board policy governing the interviewing of witnesses who are not supervisors or agents of the party. *See* NLRB Casehandling Manual Pt. I, § 10058.4, Third-Party Witnesses and Attorney/Representative (2011), *available at* http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/CHM-I.pdf. The Board is cognizant of its obligation to protect attorney-client privileged information and to avoid obtaining it from current and former employees of an entity. *See* NLRB Casehandling Manual Pt. 1, § 10058.7, Attorney-Client Privilege (2011). To that end, Petitioner admonished Weldon not to disclose privileged information and limited its questions regarding communications involving Respondent's General Counsel, Tiffinau Pagni, to only those areas necessary to establish foundational information going to the existence *vel non* of such a privilege. (Pet. Exh. 6 at 12–13)

Respondent also argues that Petitioner's exhibits in support of the Rebuttal should be stricken because, under *Provenz v. Miller* and related cases, the raising of new facts in a reply brief is improper. (Resp. Mot. at 2.) But *Provenz* is inapposite because motions for summary judgment, like the one at issue in that case, come at the end of discovery period, after the parties have had the benefit of a thorough airing of the relevant evidence. In contrast, the Section 10(j) Petition at issue here proceeds without such an exhaustive disclosure—a point that is driven home by Respondent's presentation of new information in its Opposition. Indeed, a more careful reading of *Provenz* shows that the Ninth Circuit Court of Appeals favors the inclusion of

evidence submitted prior to the determination of a dispositive motion. In *Provenz*, the Ninth Circuit reviewed a district court's denial of a non-movant's motion to strike evidence submitted with the movant's reply brief, on the one hand, while refusing to consider evidence offered in rebuttal by the non-movant, on the other. 102 F.3d 1478, 1483 (9th Cir. 1996). The Court found that the District Court had erred by excluding the evidence, noting that the Federal Rules of Civil Procedure provide for parties to serve affidavits "prior to the day of hearing," and considered the later-submitted evidence from both parties. *Id.*

In short, Weldon's sworn statement reflects newly acquired information that was obtained pursuant to longstanding Board investigative practices and is properly offered to rebut Respondent's assertion in its Opposition that it did not refuse to hire Genesther Taylor because of her union activity or affiliation.

III. RESPONDENT HAS NOT MET ITS BURDEN TO ESTABLISH ATTORNEY CLIENT PRIVILEGE

Respondent has failed to make the requisite showing to establish that former Human Resources manager Valerie Weldon's statement to the Board should be covered by attorney-client privilege under applicable law. This action arises under Section 10(j) of the National Labor Relations Act, which is a federal law; issues concerning application of the attorney-client privilege in the adjudication of federal law are governed by federal common law. *Clarke v. Am. Commerce Nat. Bank*, 974 F.2d 127, 129 (9th Cir. 1992) (citing *United States v. Zolin*, 491 U.S. 554, 562, 109 S.Ct. 2619, 2625, 105 L.Ed.2d 469 (1989); *United States v. Hodge and Zweig*, 548 F.2d 1347, 1353 (9th Cir.1977); Fed. R. Evid. 501). Under federal law, the burden of establishing that the attorney-client privilege applies rests with the party asserting the privilege. *Clarke*, 974 F.2d at 129 (citing *Tornay v. United States*, 840 F.2d 1424, 1426 (9th Cir. 1988)). In

the Ninth Circuit, "[a]n eight-part test determines whether information is covered by the attorney-client privilege":

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.

United States v. Graf, 610 F.3d 1148, 1156 (9th Cir. 2010), *quoting United States v. Ruehle,* 583 F.3d 600, 607 (9th Cir.2009). "The party asserting the privilege bears the burden of proving each essential element" of the eight-part test. *Id., quoting Ruehle,* 583 F.3d at 608.

Moreover, "[b]ecause it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed." *Ruehle* at 607, *quoting Martin,* 278 F.3d at 999. "The fact that a person is a lawyer does not make all communications with that person privileged." *Id., quoting United States v. Martin,* 278 F.3d 988, 999 (9th Cir. 2002). Therefore, a party claiming the privilege must identify specific communications and the grounds supporting the privilege as to each piece of evidence over which privilege is asserted. *United States v. Osborn,* 561 F.2d 1334, 1339 (9th Cir.1977). Blanket assertions of privilege are "extremely disfavored." *Clarke v. Am. Commerce Nat'l Bank,* 974 F.2d 127, 129 (9th Cir. 1992).

Respondent has not met its burden, as the party asserting the privilege, to show Weldon was acting as its attorney in her overall capacity as a human resources manager, much less during any specific conversation referred to in her sworn statement. Weldon was Respondent's Executive Director for Human Resources, not its General Counsel. (Resp. Mot. Exh. B, Pagni Dec. at 4.) This is important because "presumption has now arisen that an attorney employed in the legal department of a corporation is employed to provide legal advice but an attorney employed on the business or management side of a corporation is not." Edna Epstein, 1

Attorney-Client Privilege and the Work Product Doctrine 205–06 (5th ed. ABA 2001); *see also Breneisen v. Motorola, Inc.*, 2003 WL 21530440, at 3 (N.D. Ill. July 3, 2003) ("There is a presumption that a lawyer in a legal department of the corporation is giving legal advice, and an opposite presumption for a lawyer who works on the business or management side"). Indeed, Weldon identified Tiffinay Pagni as "the corporate attorney," demonstrating her understanding that Pagni, not she, was Respondent's legal counsel. (*Id.* at 17 (emphasis added)). Respondent represents that Weldon reported directly to the General Counsel, Tiffinay Pagni, but Pagni is also Respondent's Vice President for Human Resources. (Resp. Mot. Exh. B, Pagni Dec. at 2.) It stands to reason that Weldon, as a senior Human Resources director, would report directly to the Vice President for Human Resources, and so her reporting to Pagni does not establish that Respondent employed her in her capacity as an attorney, or even that she worked in the legal department. *Cf. Reed v. Advocate Health Care*, 2007 U.S. Dist. LEXIS 56245 (N.D. Ill. Aug. 1, 2007)(where lawyer was both in-house counsel and a vice-president, court concluded it would have to examine the documents as to which privilege was claimed to determine in what capacity they had been produced). Although Respondent points to a memorandum describing one of Weldon's many job duties as acting as a "Legal Representative for the Company," (Resp. Exh. B at 4-5), this conclusory description is not supported by any examples of such work performed by Weldon or how that work constituted legal services. Likewise, Respondent's reliance on its own self-serving admonitions in a disciplinary form it presented to Weldon on or about April 25, 2014, well after the conclusion of what is alleged to have been an unlawful scheme to avoid its obligation to bargain, does not show with particularity how Weldon performed legal services for Respondent. (Resp. Mot. at 3–4.)

In contrast, Weldon described with specificity her role as Executive Director for Human Resources. She states that she performed "a big job with different responsibilities," including being "responsible for human resources concerns at the corporate office," and also "managerial responsibility for 13 to 14 HR managers across the country." (Pet. Exh. 6 at 18–19.) Weldon was responsible for handling "anything that was HR related." (*Id.* at 19.) During the period when Respondent conducted hiring and prepared to assume control of the Sacramento Job Corps, Weldon was "responsible for the HR piece . . . includ[ing] the logistics of the hires," and she would "facilitate the hiring process" by "get[ting] them on board . . . include[ing] benefits and . . . payroll." (*Id.* at 19.) Weldon's description of her own work clearly demonstrates that she was operating as a senior human resources manager, not as legal counsel. Thus, Respondent has not established that it relied on Weldon in her capacity as an attorney.

Not only was Weldon acting as Respondent's human resources manager, not its attorney, but much of Weldon's statement transcript relates information not even remotely cognizable under the attorney-client privilege. The privilege, which is to be strictly construed, covers only confidential communications relating to the provision of legal advice. Respondent can hardly argue that Weldon disclosed such communications when she related that Roy Adams visited the Sacramento site during the transition, or that Adams told Weldon that he was "not happy" about what had happened, and that Weldon and the others had "screwed up," and this was going to cost him "a lot of money." (Pet. Exh. 6 at 60:23–62:04.)

Similarly, Weldon's disclosure of facts, rather than communications, does not implicate the attorney-client privilege. *See Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) ("A fact is one thing and a communication of that fact is an entirely different thing. Thus, a client may not be compelled to reveal what it said or wrote to its attorney, but it may not refuse to disclose any

relevant fact within his knowledge merely because it incorporated a statement of that fact into its communication to the attorney."). Thus, Weldon's statement of fact that there was a list of employees not to be hired (Pet. Exh. 6 at 57:18) could not conceivably be covered by attorney-client privilege, nor could her statement that the hiring of certain individuals caused Respondent to exceed a threshold number of predecessor employees. (Pet. Exh. 6 at 58:06–14.) Likewise, it is a fact that Weldon returned to the Sacramento Job Corps during the week of March 23, 2014, and while there generated the Qualification Assessment Forms and File Notes that Gagnon later averred he relied on in making hiring decisions three weeks earlier. (Pet. Exh. 6 at 64–75.)

Petitioner also takes exception to Respondent's assertion that it improperly questioned Weldon regarding certain communications she had with senior management. (Resp. Mot. (ECF No. 21) at 5:06–10.) Petitioner adhered to longstanding Board procedures by not eliciting statements from Weldon disclosing communications it reasonably believed were covered by privilege. *See* NLRB Casehandling Manual Pt. I, § 10058.7. Petitioner only inquired about foundational information necessary to determine whether any such communications are in fact covered by the privilege. *See United States v. Jackson*, 2007 WL 4225403, at 3 (D.D.C. 2007) ("The existence of a communication between an attorney and her client is not privileged, even if the content of that communication would otherwise be protected"); *Thompson v. Cincinnati Ins. Co.*, 2010 WL 4667100, 3 (N.D.Fla. 2010) ("It is well-established that the 'structural framework,' or 'eternal trappings' of the attorney-client relationship, as opposed to the substantive communications made during the relationship, are not privileged…Thus, existence of the relationship, dates and general subjects of meetings, and the identity of persons at those meetings, are not privileged information.") (*quoting Langer v. Presbyterian Medical Center of Philadelphia*, 1995 WL 79520, at 13 (E.D.Pa. 1995)).

Respondent simply has not met its burden to prove each and every element required to establish attorney-client privilege regarding any specific statements in Weldon's transcript, much less with respect to the transcript as a whole. Because it has not met its burden to establish this narrowly construed privilege, the Court should deny Respondent's motion to strike Weldon's sworn statement and the references thereto in Petitioner's Rebuttal.

IV. CONCLUSION

Petitioner emphatically opposes any delay in the disposition of this matter. Respondent will have ample opportunity to formulate its response to Petitioner's Rebuttal prior to the hearing on January 23, 2015. With respect to the wholly separate issue of whether the sworn statement of Respondent's former Executive Director Human Resources, Valerie Weldon, should be stricken in its entirety, Respondent has not met its burden to show that Weldon was acting as its attorney when she participated in any particular communications, nor has it shown why elements of Weldon's statement that do not reflect communications should be covered by the privilege. Petitioner respectfully submits that Respondent's Motion to Strike should therefore be denied in its entirety, with the exception that Petitioner has no objection to Respondent filing a sur-rebuttal no later than January 20, 2015.

DATED AT San Francisco, California, this 14th day of January, 2015.

/s/ Joseph D. Richardson

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